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December 2, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Application of Dominion Energy South Carolina, Incorporated for
Adjustment of Rates and Charges (See Commission Order No. 2020-313)
Docket No. 2020-125-E

(*This filing includes a request for an increase to retail electric rates.)

Dear Ms. Boyd:

Attached for filing is a Motion to Strike Impermissible Expert Testimony filed on behalf of Dominion Energy South Carolina, Inc. ("DESC") in the above-referenced docket.

By copy of this letter, we are also serving the parties of record with a copy of DESC's Motion to Strike Impermissible Expert Testimony and attach a certificate of service.

If you have any questions, please advise.

Very truly yours,

A handwritten signature in blue ink that reads "Matthew W. Gissendanner".

Matthew W. Gissendanner

MWG/kms
Enclosure

(Continued . . .)

cc: Alexander W. Knowles, Esquire
 Andrew M. Bateman, Esquire
 Carri Grube-Lybarker, Esquire
 Christopher M. Huber, Esquire
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 Derrick Williamson, Esquire
 John Coffman, Esquire
 (all via electronic mail only with enclosures)

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE:)	
)	DESC’s Motion to Strike
)	Impermissible Expert Testimony
Application of Dominion Energy South)	
Carolina, Incorporated for Adjustment of)	
Rates and Charges)	
)	

Dominion Energy South Carolina, Inc. (“DESC” or the “Company”) files this motion¹ to exclude and strike certain portions of the written direct testimony of Scott Hempling, Esquire. On Pages 9-26 of his testimony, Mr. Hempling’s testimony offers legal conclusions, advice, and recommendations couched in an expert capacity. South Carolina law prohibits such expert testimony. The Commission should grant this motion in limine and prevent Mr. Hempling from offering legal conclusions, advice, and recommendations under the imprimatur of an expert.

The South Carolina Rules of Evidence apply to this proceeding before the Commission. See S.C. Code Ann. Reg. § 103-846 (“The rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed”). Rule 702 of the applicable South Carolina Rules of Evidence allows for expert testimony “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”

However, the scope of such expert testimony is limited. It is beyond contestation that “[e]xpert testimony on issues of law is inadmissible” in South Carolina. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). After all, expert opinions on legal arguments are not

¹ The Company fully reserves all rights for the arguments set forth in this motion and, in filing this motion, the Company is not waiving any positions set forth in its rebuttal testimony. The Company is today filing rebuttal testimony to the direct testimony of Mr. Hempling. The filing of that rebuttal testimony likewise does not waive any arguments presented in this motion. Should the Commission grant this motion, then the Company would have no need to tender the rebuttal testimony on these issues at the hearing.

designed to assist the trier of fact in understanding the factual evidence and, therefore, they fall outside the scope of Rule 702, SCRE. See, e.g., Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it “was not designed to assist” the court’s understanding of “certain facts, but, rather, was legal argument” as to why the court “should rule, as a matter of law,” on the legal question before it); Kirkland v. Peoples Gas Co., 269 S.C. 431, 434, 237 S.E.2d 772, 773 (1977) (affirming the circuit court’s exclusion of expert testimony that “constituted conclusions of law reserved to the province of the court”).

In Dawkins, our supreme court held the circuit court properly refused to consider the affidavit of the eminent John Freeman, an attorney and former Professor of Law at the University of South Carolina School of Law, noting “Professor Freeman’s affidavit reads as if it could have been respondents’ oral argument to the trial court at the summary judgment hearing.” 354 S.C. at 67, 580 S.E.2d at 437. The same concerns exist with Mr. Hempling’s testimony.

Mr. Hempling opines on his interpretation of South Carolina law on prudence in the rate making context. See Hempling Direct p. 9-14. Mr. Hempling further advocates for the Commission to adopt a new methodology and procedure to analyze a utility’s incurred costs despite the fact that his proposed methodology and procedure violate binding precedent from our Supreme Court.² Id. at p. 15-21. Mr. Hempling then proceeds to advise how the Commission should avoid this binding precedent and employ his new and improper methodology and procedure. Id. at 21-26. In short, Mr. Hempling testimony reads as argument by counsel for a wholesale rewrite of South Carolina law and offers legal opinions to achieve that goal. Mr.

² Moreover, the Commission lacks the authority to utilize Mr. Hempling’s proposal in this proceedings. See, e.g., Daniels v. City of Goose Creek, 314 S.C. 494, 498, 431 S.E.2d 256, 260 (Ct. App. 2003) (holding that any modification of supreme court case law must be undertaken by the supreme court).

Hempling's testimony violates settled South Carolina jurisprudence just Professor Freeman's testimony violated the scope of permissible expert testimony.

These legal interpretations, conclusions, and words of advice from Mr. Hempling are inadmissible despite being characterized as expert testimony. As our appellate courts have clarified, legal issues lie exclusively within the province of the court. See Kirkland, 269 S.C. at 434, 237 S.E.2d at 773; Dawkins, 354 S.C. at 66, 580 S.E.2d at 437. Allowing Mr. Hempling to provide this testimony would violate Supreme Court precedent and would constitute reversible error if considered by the Commission. Therefore, the Commission should issue an order excluding and striking such testimony contained on Pages 9-26 of Mr. Hempling's direct testimony.³

Respectfully submitted,

s/ Michael J. Anzelmo
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³ Addressing the issue now will conserve judicial resources by rendering unnecessary objections at the hearing to address this improper expert testimony. See Davenport v. Goodyear Dunlop Tires N. Am., Ltd., No. 1:15-cv-3751-JMC, 2018 WL 2355222, at *1 (D.S.C. May 24, 2018) (observing "[t]he purpose of a motion in limine is to allow a court to rule on evidentiary issues in advance of trial . . . to avoid delay, ensure an even-handed and expeditious trial, and focus the issues" under consideration (quoting Newkirk v. Enzor, No. 2:13-cv-1634-RMG, 2017 WL 823553, at *2 (D.S.C. Mar. 2, 2017))).

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December 2, 2020

Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE:)	CERTIFICATE OF SERVICE
Application of Dominion Energy South)	
Carolina, Incorporated for Adjustment of)	
Rates and Charges)	
)	
)	

This is to certify that have served this date one (1) copy of Dominion Energy South Carolina, Inc.'s **Motion to Strike Impermissible Expert Testimony** in the above-referenced matter to the person(s) named below by causing said copy to be electronically mailed, addressed as shown below:

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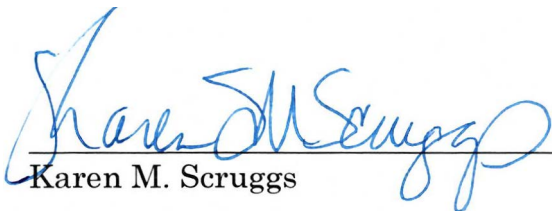
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December 2, 2020

Columbia, South Carolina